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EQUITABLE CONVERSION.[1]

III.

THE way having been cleared, as stated at the end of my last article, I now proceed to consider the subject of equitable conversion.

Equitable conversions, like actual conversions, are of two kinds, namely, those which are direct and those which are indirect; and the reason for making this division of equitable conversions is the same as that for making the corresponding division of actual conversions, namely, that a direct equitable conversion is, so far as it is a conversion at all, a direct or immediate change (or what Lord Hardwicke in one case[2] calls a transmutation and in another case[3] a transubstantiation) of one thing into another, as, for example, land into money or money into land, while an indirect equitable conversion is, so far as it is a conversion at all, an exchange of one thing for another, as, for example, land for money or money for land, and is therefore a change of land into money or of money into land only indirectly, *i. e.*, through the medium of such exchange.

A direct equitable conversion differs from a direct actual conversion in this, namely, that while the latter is a fact, the former is a pure fiction. To say, indeed, that a direct equitable conversion

[1] Continued from 18 HARV. L. REV. 83.

[2] Guidot *v.* Guidot, 3 Atk. 254, 256.

[3] Trafford *v.* Boehm, 3 Atk. 440, 448. It must be confessed, however, that Guidot *v.* Guidot and Trafford *v.* Boehm are both cases of indirect conversion.

is other than a pure fiction would be to claim for equity those miraculous powers which the ancient alchemists claimed for themselves.

In order to state the difference between an indirect equitable conversion and an indirect actual conversion, it is necessary, first, to remind the reader that, in the making of an actual exchange of one thing for another, there are generally, though not necessarily,[1] two stages, namely, first, the creating by the owner of the thing to be exchanged of a right in another person to have the exchange made, with a correlative obligation to make the exchange, and, secondly, the actual making of the exchange; and, this being borne in mind, the reader needs only to be told further that whenever these two stages exist in the making of an actual exchange, the creating of the right, if it be one which can be specifically enforced, causes an equitable conversion. It may be added that this right is sometimes legal, and sometimes equitable only.

The immediate object of the direct equitable conversion is to cause a thing to devolve, on the death of its owner, not according to its true nature and quality, but according to the nature and quality which equity, by a fiction, attributes to it, for example, to cause land to devolve as if it were money or money as if it were land. So also it is the immediate object of an indirect equitable conversion to cause the right to have an exchange made to devolve, on the death of its owner, not according to the legal nature of the right, *i. e.*, as a *chose in action*, but according to the nature and quality of the thing to be acquired by the exchange, for example, to cause a right to have land exchanged for money, to devolve as if it were money, or to cause a right to have money exchanged for land to devolve as if it were land.

The ultimate object of a direct equitable conversion is to promote justice, to aid the owner of property in accomplishing an object which he has in view respecting such property, or to promote public policy. The ultimate object of an indirect equitable conversion, on the other hand, is to give more full and complete effect to an act done by the owner of property in respect to such property, and to carry out more fully his presumed intention respecting the same.

Of direct equitable conversions there are more than one species. The most familiar is where an actual conversion of

[1] 18 HARV. L. REV. 2, 3.

property has been made by some person other than its owner, and under such circumstances that justice requires that, on the death of its owner, it should devolve as if no such conversion had been made, and accordingly equity for the purposes of devolution re-converts it, *i. e.*, by the adoption of a fiction, treats it as if it had been actually re-converted or as if it had never been converted, so that land into which money has been converted, though it will devolve at law as land, will devolve in equity as money, and money into which land has been converted, though it will devolve at law as money, will devolve in equity as land. In short, equity will declare the heir or devisee of the deceased, on whom the land has devolved at law, to be a trustee thereof for the personal representative of the deceased, and will treat him accordingly, and will declare the personal representative of the deceased, on whom the money has devolved at law, to be a trustee thereof for the heir or devisee, and will treat him accordingly. It will be seen, therefore, that this species of direct equitable conversion is caused by means of a trust, — a trust, however, which is peculiar, first, in being an implied or constructive trust, *i. e.*, a trust created, not by the owner of the property, but by equity itself, and, secondly, in being precisely like the ancient use, *i. e.*, a simple or passive trust, a trust in which the *cestui que trust* has the entire control over the property in equity, and in which the trustee is merely the servant of the *cestui que trust*, and has no other affirmative duties to perform than to convey the property as the *cestui que trust* shall direct.

In all these particulars this species of direct equitable conversion differs widely from an indirect equitable conversion, for, though a trust is often the cause of the latter, yet it is always a trust created by the owner of the property, and is always an active trust, — a trust also in which, if the trust be valid, the right of the *cestui que trust* is limited entirely to enforcing the specific performance of the trust. Moreover, it is not the existence of such a trust, but its capability of being specifically enforced in equity, that is indispensable to the creation of an indirect equitable conversion. While, therefore, it is the doctrine of trust that causes the direct equitable conversion last spoken of, a trust being the machinery by which equity transfers property from its legal owner to another person, it is the doctrine of specific performance that causes the indirect equitable conversion.

If we look a little more closely into the nature of these two

kinds of equitable conversion, and observe a little more closely the differences between them, we shall find that, while an indirect equitable conversion constitutes the first step, and the first step only, toward an alienation of the thing to be converted, and an acquisition by the alienor or some other person, of the thing into which the conversion is to be made, the direct equitable conversion now in question constitutes a complete alienation in equity of the thing said to be converted, and a complete acquisition in equity of the same thing by another person, though with a fictitious quality attributed to it. We shall also find that, while an indirect actual conversion is caused by the exercise of an absolute right of property, and hence the conversion itself is absolute, and an indirect equitable conversion is caused by the creation of a relative right, and is itself relative only, the direct equitable conversion in question is caused, not by the exercise of any right, but by the power of equity, and hence the conversion which is caused by the exercise of that power and the right which is created by its exercise are both absolute, in so far as it is in the power of equity to make them absolute.[1]

There is also another particular in which the direct equitable conversion in question differs from an indirect equitable conversion, namely, that as the former exists only for the purpose of changing the devolution of the property which it affects, so it exists only for an instant of time, while as the latter is brought into existence by the creation of a right to have an actual conversion made, so it continues to exist until that right is specifically enforced, or otherwise ceases to exist. It follows, therefore, that, when a direct equitable conversion has once accomplished its purpose of causing money to devolve as if it were land or land as if it were money, the fiction ceases, and henceforth equity regards the money as money and the land as land.

For the present, however, we shall be occupied exclusively with equitable conversions of the indirect kind, and my chief object in saying in this place what I have already said about direct equitable conversions is to caution the reader against the danger of confounding the former with the latter. As the fact of a direct equitable conversion is much more easily expressed than that of an indirect one, the reader will often find himself under a sore

[1] See *infra*, pp. 250, 260, 264, 268. For the sense in which the terms "absolute right" and "relative right" are used in this article, see 13 HARV. L. REV. 537–538, 546, note.

temptation, when dealing with indirect equitable conversions, to say of money that it is land in equity when in fact it is merely liable to be exchanged for land, and of land that it is money in equity when it is merely liable to be exchanged for money. This temptation, however, he must resist if he would avoid the most serious errors. He must remember that while actual conversions as well as equitable conversions may be either direct or indirect, yet the only actual conversions which are known to the law are those which are indirect; and hence direct equitable conversions have no actual conversions to correspond with them. If an actual conversion of land, for example, directly into money or of money into land were possible, it would be admitted by all that the nomenclature belonging to direct equitable conversions could be used only when the actual conversion which was to follow would also be direct. The fact being, however, that there is only one kind of actual conversion known to the law, it is equally true that the nomenclature which belongs to direct equitable conversions can be used only when the equitable conversion is not to be followed by any actual conversion; and it must not be supposed, because there are two kinds of equitable conversion, and only one kind of actual conversion, that therefore the latter stands in the same relation to each of the former. When land is exchanged for money, the land never becomes money, nor the money land, either in equity or otherwise; when the exchange is made, they both change owners, but the land remains land and the money remains money all the time, in equity as well as in fact; and the only reason why the land is said to be converted into money and the money into land is that he who before owned the land now owns the money instead, and he who before owned the money now owns the land instead; and the only reason why the creation of a right to have money exchanged for land is said to cause a conversion of the money into land in equity is that this right devolves as if it were land, and equity looks upon it as substituted in the place of the money.

An indirect equitable conversion can regularly be made only by the owner of the thing to be converted, and in a broad sense it may be said that it can be made by him in one way only, namely, by creating in some other person a right to have an actual conversion made; and such a right, if it be one which equity will specifically enforce, will cause an equitable conversion. Why? Because, if the owner of such a right die during its

continuance, the right will devolve in equity, if it be a right to have money converted into land, as if it were land, and, if it be a right to have land converted into money, it will devolve as if it were money. Why will the right so devolve? Because equity looks upon it as sure to be specifically enforced, unless the correlative obligation shall be voluntarily performed, and when the right is so enforced, or the correlative obligation is so performed, the result will be an actual conversion of money into land or of land into money, with all the consequences which follow such a conversion. If, for example, A and B enter into an ordinary bilateral contract for the sale of land by A to B, we may assume that, up to the moment when the contract is made, A owns the land to be sold and B owns the money to be paid for the land, and these are absolute rights.[1] When the contract is made, A and B each acquires a new relative right, namely, A a right to have money, and B a right to have land, and at the same time each of them incurs a correlative obligation, namely, A to convey the land and B to pay the money; and, as equity regards it as certain that both these obligations will be performed, it regards the new relative rights as having superseded, for the purposes of devolution, the former absolute rights. To be sure, B's money will, in case of his death, in form devolve upon his executor, but it will be only a form, as it must eventually go to A in payment for the land. So A's land will in form devolve, in case of his death, upon his heir or devisee; but this again will be only a form, as the land will eventually have to be conveyed to B in performance of A's obligation. As, therefore, the new relative rights have superseded in equity the old absolute rights, they ought to devolve, not as the old absolute rights would have devolved, but as the new absolute rights would devolve, if the sale had been complete; and hence, if B die before the purchase is completed, his new relative right under the contract will devolve in equity on his heir or devisee.[2]

In the example just put, moreover, it is plain that B's money, in case of his death, does not become land in equity for the purposes of devolution, for this money goes to A, as to whom no question of equitable conversion arises. It is not, therefore, B's money, but his right to A's land, that is treated by equity as land. So also, in case of A's death, it will not be his land, but his right

[1] See *supra*, page 248, note.

[2] *Per* Lord Hardwicke, in Gibson *v.* Lord Montford, 1 Ves. 485, 494; Milner *v.* Mills, Mos. 123; Garnett *v.* Acton, 28 Beav. 333.

to B's money, that equity will treat as money. And so it is in all other cases of indirect equitable conversion.

How can a right to have an actual conversion made be created? In two ways, namely, either by a contract to buy or to sell land, or by a direction to another person to do so. Of such contracts, there are more than the one species already mentioned, though that is practically the only one that is bilateral, and is believed to be absolutely the only one by which an equitable conversion is created both of land into money and of money into land, as well as the only one in which an agreement to buy or sell land is alone sufficient to create an equitable conversion. Such a contract is also believed to furnish the only instance of an equitable conversion which is always coextensive with the actual conversion which is agreed or directed to be made.

As no right can cause an equitable conversion unless it can be enforced specifically, and as a bilateral contract for the sale and purchase of land cannot be enforced specifically at the suit of either party, unless it can be so enforced at the suit of each party, it follows that such a contract cannot cause an equitable conversion, either of land into money or of money into land, unless each party is capable of performing his side of the contract, and can be compelled to do so. If, therefore, the seller cannot make such a title to the land as the buyer will be compelled to accept, there will be no equitable conversion,[1] unless the buyer shall choose to accept such a title as the seller can make, though, if the buyer so accept the seller's title as to prevent his afterwards objecting to its insufficiency, the effect of the contract will henceforth be the same as if the title had been good. So, if either party shall lose his right to enforce specific performance by laches or delay, the equitable conversion will then cease, unless the other party shall choose to waive the defense thus opened to him. Moreover, if a seller be unable to make a good title, and the buyer die before the purchase is completed, his executor may prevent a specific performance by refusing to pay the purchase money, though the buyer's heir or devisee may wish to accept such a title as the seller can make, for the only person who can waive a defense to a claim is the person against whom the claim is made, and here that person is the buyer's executor, for it is he who must pay the

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[1] Green *v.* Smith, 1 Atk. 572; Broome *v.* Monck, 10 Ves. 597; Thomas, *In re*, 34 Ch. D. 166.

purchase money.[1] And the same will, of course, be true of any other defense against specific performance which was open to the buyer when he died. So, if the seller die after the buyer has lost his right to specific performance by laches or delay, the seller's heir or devisee may prevent specific performance by refusing to convey the land, though the seller's executor will, of course, wish specific performance to be enforced, in order that he may obtain the purchase money.

If a buyer die before the purchase is completed, and his right to specific performance is afterwards lost without the fault of his heir or devisee, the general opinion has been that the heir or devisee, though he cannot have the land, will be entitled to receive the purchase money from the buyer's executor. Thus, where the contract was binding on the buyer, but a power of rescission was reserved to the seller, and was exercised by him after the death of the buyer, who died intestate, it was held that the heir of the latter, though he could not have the land, was entitled to receive the purchase money from the buyer's executor.[2] So in Whittaker *v.* Whittaker,[3] where the buyer, after making the contract devised the land by way of family settlement, the plaintiff being the first tenant for life, but the buyer's right to specific performance was lost after his death, owing to a long-continued uncertainty as to whether he had left sufficient assets to enable his executor to pay for the land, Sir R. P. Arden, M. R., held that the plaintiff, though not entitled to have the purchase money paid over to him, was entitled to have it invested in other land, to be settled to the same uses to which the land contracted for had been devised. He rested his decision, however, not upon the contract, but upon the will, and, for that reason, Lord Eldon, in an elaborate judgment in Broome *v.* Monck,[4] while approving of the decision, rejected the ground upon which it was rested. So, if the seller die before the sale is completed, and his right to specific performance is afterwards lost without the fault of his executor, the general opinion

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[1] Langford *v.* Pitt, 2 P. Wms. 629, 632; Alleyn *v.* Alleyn, Mos. 262; Milner *v.* Mills, Mos. 123; Garnett *v.* Acton, 28 Beav. 333; Hood *v.* Hood, 3 Jur. N. S. 684. And, as the buyer's executor must pay the purchase money to the seller, if the latter be also the buyer's heir, he may keep the land as such heir, and yet compel the buyer's executor to pay him the purchase money. *Cum duo jura in una persona concurrunt, aequum est acsi essent in diversis.* Coppin *v.* Coppin, 2 P. Wms. 291.

[2] Hudson *v.* Cook, L. R. 13 Eq. 417.

[3] 4 Bro. C. C. 31.

[4] 10 Ves. 597.

has been that the latter, though he cannot recover the purchase money from the buyer, can recover the land from the seller's heir or devisee.[1] It seems impossible, however, to reconcile these views with any principle. Up to the moment of his death the buyer had only a right to the land, and that was on condition of his paying the purchase money to the seller, and he was also under an obligation to pay the purchase money on the condition of his receiving the land; and, on his death, his right devolved in equity on his heir or devisee, and his obligation devolved on his executor. It is assumed that the seller refuses to convey the land and that he cannot be compelled to convey it, and hence that the buyer's executor cannot be compelled to pay the money to the seller. Therefore, it is said, he must pay it to the buyer's heir or devisee! So also the seller, up to the moment of his death, had only a right to receive the money, and that was on condition of his conveying the land, and he was also under an obligation to convey the land on condition of his receiving the money; and, on his death, both his right and his obligation devolved at law upon his executor, though his obligation devolved also in equity, with the land, upon his heir or devisee. It is assumed that the buyer refuses to pay the money, and that he cannot be compelled to pay it, and hence that the seller's heir or devisee cannot be compelled to convey the land to the buyer. Therefore, it is said, he must convey it to the seller's executor! Could there be two more palpable nonsequiturs? A (the buyer's heir or devisee) files a bill against B (the buyer's executor) and C (the seller) to compel B to pay money to C, and to compel C to convey land to A. A is wholly defeated, and what is the consequence? That his bill is dismissed with costs? No; that his bill is dismissed as against C, but that a decree is made in his favor against B that he pay the money directly to A. Why? For no other reason than that it has been found that he is not bound to pay it to C. So, again, A (the seller's executor) files a bill against B (the seller's heir or devisee) and C (the buyer) to compel B to convey land to C, and to compel C to pay money to A. A is wholly defeated, but, instead of his bill's being dismissed with costs, a decree is made in his favor against B that, as it has been found that he is not bound to convey the land to C, therefore he shall convey

[1] In Curre *v.* Bowyer, 5 Beav. 6, note (b), where the seller had died, and the buyer afterwards lost his right to specific performance, Sir John Leach held that the seller's next of kin were entitled to the land.

the same to A! For neither of these conclusions, however, can any more than two reasons be given, namely, for the first, that the buyer's heir or devisee has, without his fault, been disappointed in his expectation of getting the land, and that the seller is not entitled to the money, and, for the second, that the seller's executor has, without his fault, been disappointed in his expectation of getting the money, and that the buyer's heir or devisee is not entitled to the land; and none of these reasons are good. To make the first and third of any value it must appear that the disappointment was, in whole or in part, the fault of the buyer's executor and the seller's heir or devisee respectively, and this neither appears nor is assumed. As to the second and fourth reasons, it would be sufficient to say that the fact of A's not being liable to B is no reason for saying he is liable to C. In this case, however, it is possible to say more; for the non-liability of the executor of the buyer to the latter's heir or devisee is a much clearer proposition than his non-liability to the seller, for his liability to the latter lacks only the performance of a condition, while he is, in law, a total stranger to the former. So, also, the non-liability of the heir or devisee of the seller to the latter's executor is a much clearer proposition than his non-liability to the buyer's heir or devisee, for his liability to the latter lacks only the performance of a condition, while he is, in law, a total stranger to the former.

Upon the whole, it seems clear, on principle, that the executor of a buyer of land is bound, as such executor, only by his testator's contract of purchase, and that such contract binds him to do one thing only, namely, to pay the purchase money to the seller, and that he can be compelled to do this either by the seller, or by the heir or devisee of the buyer, — by the latter, because the payment is necessary to enable such heir or devisee to obtain the land; but that if, in a given case, the seller is not entitled to the money, the executor of the buyer is under no obligation to pay it to anyone, but is entitled to keep it as such executor. So it seems equally clear that the seller's heir or devisee is bound only to convey the land to the buyer, and that he can be compelled to do this either by the buyer, or by the seller's executor, — by the latter, because the conveyance is necessary to enable him to obtain the money; but that if, in a given case, the buyer is not entitled to the land, the heir or devisee of the seller is under no obligation to convey it to anyone else, but is entitled to keep it.

If, in case of the death of the buyer before the purchase is com-

pleted, it be doubtful whether he has left sufficient assets to enable his executor to pay for the land, or if, in a suit for specific performance, his executor shall refuse to admit sufficient assets for that purpose, his heir or devisee may always secure the land by himself advancing the purchase money, and he may do this with a certainty of being reimbursed, if the assets left by the buyer shall turn out to be sufficient to reimburse him.[1]

A contract for the sale and purchase of land has always been treated by the courts as creating an equitable conversion in favor of the seller as well as in favor of the buyer. In truth, however, as has been seen in a previous article,[2] such a contract works a conversion of the seller's land into money on legal principles, and without any other aid from equity than such as it affords by enforcing the contract specifically against the seller's heir or devisee. In short, the right of the seller to receive the purchase money in exchange for his land will devolve on his executor by operation of law, whereas, in order to create an equitable conversion, it must so devolve in equity alone.

There is another species of bilateral contract which has been held, in a few cases,[3] to create an equitable conversion in favor of one of the parties to it, namely, a building contract, *i. e.*, a contract between a land owner and a builder for the erection of a building by the latter on the land of the former. In case of the death of the land owner before the building is erected, his heir or devisee will alone profit from the performance of the contract by the builder, and, therefore, there is strong reason why the land owner's right to such performance should devolve in equity with the land on his heir or devisee, though the performance must be at the expense of his executor, for, if such right should devolve, with the obligation to pay its price, upon the executor, the contract would be certain not to be performed, as the executor would find it much cheaper to buy off the builder than to pay him for performing the contract. Still, there is a very serious obstacle to be removed before such a contract can work an equitable conversion, namely, the refusal of equity to enforce the specific performance of the contract. Why is it, then, that such a contract is held to work an equitable conversion? Because formerly, and

[1] *Per* Lord Eldon, in Broome *v.* Monck, 10 Ves. 597, 614–615.

[2] See 18 HARV. L. REV. 10.

[3] For example, in Holt *v.* Holt, 2 Vern. 322, and *per* Lord Hardwicke in Rook *v.* Worth, 1 Ves. 460, 461.

when the doctrine was settled, equity did enforce the specific performance of building contracts, — and in fact it never refused to do so till since the time of Lord Hardwicke;[1] and the doctrine is still adhered to[2] as being established by authority, notwithstanding the *sine qua non* of specific performance has failed, just as a contract for the purchase of land has been held to work an equitable conversion in favor of the heir or devisee of the buyer, notwithstanding the buyer's right to specific performance has been lost, the court giving the money to the heir or devisee when he cannot have the land. Is, then, the doctrine that a building contract works an equitable conversion of the land owner's money into land, just as a contract for the purchase of land does, to be deemed erroneous on principle? Yes, unless equity shall consent to make an exception in favor of the heir or devisee of a deceased land owner, to its rule that a building contract will not be specifically enforced, — which, it seems, equity might do.

The only other species of contract which it will be necessary to notice, as causing an equitable conversion, differs very widely from the two species of contract already considered, it being the unilateral covenant often found in English marriage settlements and marriage articles, to lay out a given sum of money in the purchase of land, or to purchase land of a given annual value and to settle the land so purchased. Such a covenant is, therefore, an agreement to make a settlement, the reason for making such a covenant instead of an actual settlement commonly being that the person who is to make the settlement has not the land at the time of the marriage, or has not land which he wishes, or is in a condition to settle. The reader will see, at once, therefore, how widely such a covenant differs from the ordinary agreement for the purchase and sale of land. It does, indeed, involve a purchase of land, and, therefore, an agreement for purchase and sale of land, but such purchase is to be made of some third person, not ascertained at the date of the covenant, and, of course, the agreement to purchase must be made with the same person. What is, however, of much greater legal importance is the fact that the particular land to be purchased is wholly unascertained, nothing, in fact, being fixed, except the amount of money thus to be laid out, or the annual value of the land to be purchased. What is of still greater legal importance, however, is the fact that

[1] See Rayner *v.* Stone, 2 Eden 128.

[2] Cooper *v.* Jarman, L. R. 3 Eq. 98; Day, *In re*, [1898] 2 Ch. 510.

the vital part of the agreement is to be found, not in the covenant to purchase land, but in the covenant to settle the land when purchased. Without this latter branch, indeed, the covenant would not constitute a contract at all, for, as it would be simply a covenant to purchase land with the covenantor's own money, the land, when purchased, would belong absolutely to him, and, therefore, he would incur no obligation to make the purchase; or, to express the same thing in another form, without the covenant to settle the land, no right would be created in anyone to have land purchased, and, therefore, the covenantor could neither be compelled to make the purchase, nor to pay damages for not doing so. It is, therefore, the covenant to settle the land which requires particular attention. What is meant by a settlement of land, or by settled land? The phrases "settled estate" and "settled land" have become very familiar in English law during the last half-century, no less than six "Leases and Sales of Settled Estates" acts having been passed between 1856 and 1877, both inclusive,[1] and no less than five "Settled Land" acts between 1882 and 1890, both inclusive.[2] Under these acts, a "settled estate" or "settled land" is declared to be any estate or land which stands limited to several persons in succession. The most familiar form in which land stands so limited in a marriage settlement is that of a limitation to the use of the intended husband for life, remainder, as to a part or all of the land, to the use of the intended wife for life, by way of jointure and in lieu of dower,[3] remainder to the use of the first and other sons of the marriage successively in tail, or in tail male, remainder to the use of the daughters of the marriage as tenants in common in tail, remainder to the use of the intended husband in fee. Sometimes the first limitation of all is one to the use of trustees for a long term of years in trust to raise a certain sum annually, during the coverture, for the wife by way of pin-money; and generally the first limitation after the death of the husband and wife is to trustees for a long term of years in trust to raise portions for daughters and younger sons of the marriage, in the event of there being a son

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[1] 19 & 20 Vict. c. 120, 1856; 21 & 22 Vict. c. 77, 1858; 27 & 28 Vict. c. 45, 1864; 37 & 38 Vict. c. 33, 1874; 39 & 40 Vict. c. 30, 1876; and 40 & 41 Vict. c. 18, 1877.

[2] 45 & 46 Vict. c. 38, 1882; 47 & 48 Vict. c. 18, 1884; 50 & 51 Vict. c. 30, 1887; 52 & 53 Vict. c. 36, 1889; and 53 & 54 Vict. c. 69, 1890.

[3] Within recent times, the wife's jointure seems to be generally secured by limiting to her, not an estate in land for her life, but a rent charge.

of the marriage in whom the first estate tail shall vest. The only thing, however, that can be asserted broadly of marriage settlements is that they have for their object the making of a provision for the wife and children of the intended marriage; for, within the limits which that object prescribes, the limitations in such settlements vary, as the circumstances and the views of the parties vary. It follows, therefore, that a covenant to make such a settlement must state the limitations to be made with the same particularity as the settlement itself, so that the limitations in the settlement will be a mere copy of those in the covenant.

Such a covenant is generally made by the intended husband or his father, and is made with relatives or friends of the wife, as trustees for the wife and children, and it generally provides that the land when purchased shall be conveyed to the same trustees in fee, and to the several uses specified. The covenant is also generally made in consideration of the intended marriage, and of a sum of money, paid to the husband or settlor by the wife's father, as the wife's marriage portion.

Assuming the limitations to be such as have been already stated, it will be seen that, when the covenant, and consequently the settlement, is made by the intended husband, the covenant and settlement do not extend to the life interest limited to the husband, nor to the ultimate fee which is also limited to him, those limitations being, in effect, mere reservations by the husband of a portion of what would wholly belong to him, but for the covenant and settlement. And even if the covenant and settlement be made by the husband's father, it seems that so much of the covenant as is in favor of the husband cannot be specifically enforced, as the considerations upon which the covenant is made extend only to the wife and the children of the marriage. Whether, therefore, the covenant be made by the husband or not, only so much of it as is in favor of the wife and children of the marriage creates rights which can be specifically enforced. In the first instance, moreover, it is only in favor of the wife that such a covenant creates a right, as the rights which it creates in favor of children will come into existence only as children are from time to time born; and, if there be no children of the marriage, the obligation created by the covenant will cease on the death of the wife, if the husband be the covenantor, and will cease, in any event, on the death of the husband and wife, and the land, if purchased and settled, will thenceforth belong wholly to the settlor.

Such, then, being the extent and nature of the rights created by the covenant under consideration, what is the extent of the equitable conversion which it causes? The limitations covenanted to be made in favor of the husband do not, it seems, cause any equitable conversion, even when the covenant is not made by him, there being no consideration for the covenant so far as it is in his favor, and, therefore, no right to specific performance. There is also another reason why the right of the husband, as well as that of the wife, to a life interest can practically cause no equitable conversion, namely, that it expires with the life of its owner, and hence cannot devolve on his death. The only rights, therefore, created by such a covenant, which will devolve on the death of their owner, and which, being capable of being specifically enforced, will devolve like land, are those created in favor of the children of the marriage. Moreover, as no child is generally entitled to a greater estate in the land to be purchased than an estate tail, and as such an estate expires on the death of the tenant in tail without issue, it follows that the interest of a child will devolve on his death only when he leaves issue. It must also be borne in mind that a covenant to purchase and settle land will cause an equitable conversion only so long as the covenant remains wholly unperformed, for, the moment that the land is purchased, the conversion before covenanted to be made is actually made, and the interests of the children will henceforth be land for all purposes, and without invoking the aid of equitable conversion. It will be seen, therefore, that the interest of a child under such a covenant can devolve as land, by virtue of the principle of equitable conversion, only when the covenant remains wholly unperformed until such child marries, has issue, and dies.

As it is not the right to have land purchased, but the right to have it settled, that causes an equitable conversion, of course it is the latter right, and not the former, that measures the extent of the equitable conversion caused by a covenant to purchase and settle land. This is, in fact, no more than saying that, on the death, intestate, of a person who has a right to have land which is to be purchased conveyed to him in fee-simple, such right will descend to his heir, and hence there will be an entire equitable conversion of the price of the land into land; and that, on the death of a person entitled to have land which is to be purchased conveyed to him in fee-tail, his right will descend to his issue in tail, if he leave issue, and to them alone, and hence there will be

an equitable conversion of the price of the land into land for so long a time only as there shall continue to be issue of the deceased, while, on the death of a person entitled to have land, which is to be purchased, conveyed to him for his life, no right whatever will survive the deceased, and hence there will be, for the purposes of devolution, no equitable conversion of the price of the land into land. Yet, in each of the three cases just put, the right of the deceased to have land purchased is the same, namely, to have a given sum of money laid out in the purchase of land in fee-simple, or to have the fee-simple of land of a given annual value purchased. Why? Because it is of such land that the deceased is entitled to have the fee-simple, or a fee-tail, or an estate for life, conveyed to him. If, therefore, in marriage articles the intended husband covenant to purchase and settle land, in the manner before stated, while there may be an indefinite number of persons, each of whom will be entitled to enforce the covenant specifically, and to its full extent, yet, as the covenant will direct no limitation of the fee-simple in the land to be purchased, there will remain in the husband, in every event, an ultimate reversionary interest in the money to be laid out in land, as to which there will be no equitable conversion, and, if the covenant be performed, a corresponding interest in the land purchased and settled will remain in the husband, *i. e.*, if the husband purchase the land, and convey it in fee to the trustees of the settlement to the several uses directed in the covenant, the last of those uses will be to the husband in fee.

After what has been said, it can scarcely be necessary to caution the reader against entertaining the notion that a single covenant to purchase and settle land can cause only a single equitable conversion, as it is obvious that each separate right, created by such a covenant, to acquire an inheritable interest in the land to be purchased, will cause an equitable conversion, provided the right be one which equity will enforce specifically; and even though the right be to acquire only an estate for life, there will in strictness be an equitable conversion during the continuance of that estate, though it will not be likely to be followed by any practical consequence.

Between an actual conversion and an indirect equitable conversion there is the same difference as between an absolute right and a relative right.[1] An absolute right exists for all purposes and as to

[1] See *supra*, page 248, note.

all persons, while a relative right implies a relation between two persons, one of whom has the right against the other, and the other of whom is under a correlative obligation to him who has the right. A relative right, therefore, as such, has no existence except in favor of the person who has it, and as against the person who is subject to the correlative obligation. So also an actual conversion is made in the exercise of an absolute right, and therefore it exists for all purposes and as to all persons, while an indirect equitable conversion is merely an equitable consequence of a relative right, and is, therefore, necessarily subject to the same limitations as the right of which it is a consequence. Such an equitable conversion, therefore, can have no existence except as to the person of whose right it is a consequence, — least of all can it have any existence as to the person who is subject to the correlative obligation. When, therefore, an intended husband, for example, covenants, in marriage articles, to purchase land, and settle the same, in the manner before stated, such covenant will create equitable conversions only as to the intended wife and the children of the marriage, — not as to the husband. If, therefore, the husband die intestate before performing the covenant, all his personal property will devolve upon his executor, just as if he had made no such covenant; the only difference will be that the obligation which the husband incurred by making the covenant will also devolve upon his executor. In other words, the personal property in the hands of the executor will be subject to the burden of the covenant.

Such are upon principle, as it is conceived, the effects produced by the covenant now under consideration in respect to the equitable conversion which it causes. It is time, however, to inform the reader that a very different view is presented by the authorities; for it has been held, from the earliest times, and without a dissenting voice, first, that any limitation directed by such a covenant, which confers a right to have the covenant fully performed, causes an equitable conversion into land of the entire interest in the money covenanted to be laid out in land, though the limitation which causes the conversion be only for life, *i. e.*, that the equitable conversion is measured by the actual conversion which the covenant requires, and is coextensive with it; secondly, that every such conversion is absolute, not relative, or, at least, that the money covenanted to be laid out in land is converted in equity into land, not only as to the persons in whose favor the land to be

purchased is covenanted to be limited, but also as to the covenantor; and accordingly it is held that a covenant by an intended husband to lay out money in the purchase of land and to settle the land in the manner before stated will, immediately on the solemnization of the marriage, cause a complete equitable conversion of the money so covenanted to be laid out, not only as to the wife and the children of the marriage, but as to the husband also, subject only to the condition of the wife's surviving the husband, for the limitation covenanted to be made in favor of the wife for her life will give her an undoubted right to enforce a full performance of the covenant.

Thus, in Lingen *v.* Souroy,[1] where an intended husband covenanted to lay out an identified fund of £1400 in the purchase of land, and to settle the land in the manner just stated, and there was no issue of the marriage, and the husband died without having performed the covenant, and leaving his wife surviving him, and having devised all his real estate, with a certain exception, to his nephews, and bequeathed all his personal estate to his wife, whom he also appointed his executrix, and the nephews filed a bill against the wife, claiming the £1400 subject to the wife's life interest therein, Lord Harcourt made a decree in the plaintiff's favor, holding that the £1400 passed to them as land, under the husband's will, by virtue of the words "all my other lands in the city and county of York, or any other part of Great Britain"; and his decree was affirmed by Lord Cowper on a rehearing. The plaintiffs, therefore, accomplished the extraordinary feat of recovering against the testator's wife on the strength of a right vested in her by the covenant to have the £1400 laid out in land and settled on her for life. It is to be hoped that such an instance of a *damnosa haereditas* would be sought for in vain elsewhere than in Lingen *v.* Souroy and other cases[2] which have followed its authority. If the husband had died intestate, his heir would have been relieved from a portion of the burden of proof which rested upon his devisees, for the latter had to prove, not only what the heir must have proved, but also that they had been put by the testator in the place of the heir, and it seems clear that, by the word "lands," the testator meant lands of which *locality* could be predicated, *i. e.*, actual land.

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[1] 1 P. Wms. 172, 10 Mod. 39, Gilb. Eq. Rep. 91, Ch. Prec. 400.

[2] For example, Walrond *v.* Rosslyn, 11 Ch. D. 640.

In Edwards *v.* Countess of Warwick[1] an intended husband covenanted that £10,000, being a part of the intended wife's marriage portion, and which was to be deposited by the wife's father in the hands of trustees, should be laid out by the latter in the purchase of land, to be settled on the husband for ninety-nine years, if he should live so long, remainder to the first and other sons of the marriage in tail male, remainder to the husband in fee. The marriage took place, and the husband afterward died, leaving a son in whom the first limitation in tail male vested, but who afterward died without issue, and thereupon all the limitations covenanted to be made of the land to be purchased with the £10,000 were exhausted, and the money had never been laid out. It would seem plain, therefore, that the husband's reversionary interest in the £10,000, which had been personal property from the beginning, and which, on the husband's death, had devolved on his personal representative, for the benefit of his wife and son, became an absolute interest on the death of the son, whose share therein devolved upon his personal representative for the benefit of his mother and his half-sister, *i. e.*, his mother's daughter by a second husband. It was held, however, by Lord Macclesfield, that this reversionary interest was converted in equity into land, and, on the husband's death, descended to his son and heir, and, on the death of the latter, descended to *his* heir, namely, the plaintiff's wife, who was his father's sister, and his decision was affirmed by the House of Lords.

In Lechmere *v.* Earl of Carlisle,[2] the facts were substantially the same as in Lingen *v.* Souroy, except that the intended wife's jointure was by way of a rent-charge, instead of a life estate, and that the intended husband died intestate. The bill was filed by the husband's heir, and was for a specific performance of the husband's covenant to lay out £30,000 in the purchase of land, and to settle the land; and a decree was made in the plaintiff's favor by Sir Joseph Jekyll, M. R., — which was affirmed by Lord Talbot on appeal.

In one respect the decisions in the last two cases are even less defensible than that in Lingen *v.* Souroy, for in the latter there was a right in the wife to have the covenant specifically performed, while in Edwards *v.* Countess of Warwick and Lechmere *v.* Earl of Carlisle there was no such right in anyone, either when

[1] 2 P. Wms. 171, 1 Bro. P. C., Toml. ed., 207.

[2] 3 P. Wms. 211.

the bill was filed or at any time afterward. In Edwards *v.* Countess of Warwick only one of the limitations which the husband covenanted that his trustees should make ever took effect, and that expired on the death of the son without issue, and it will, therefore, now be admitted that the equitable conversion which had once existed had ceased to exist before the bill was filed.[1] In Lechmere *v.* Earl of Carlisle the wife, on whose marriage the covenant to purchase and settle land was made, was still living, and was entitled to a jointure, but, as her jointure was to consist only of a rent-charge, she would not be entitled to any estate in the land to be purchased, — only to a charge thereon, and, therefore, she had no right to have land purchased and settled; and, though it has generally been supposed that such a right would work an equitable conversion, and was expressly so held in Walrond *v.* Rosslyn,[2] yet I shall endeavor to show hereafter that such a view cannot be supported.

In Lingen *v.* Souroy, Edwards *v.* Countess of Warwick, and Lechmere *v.* Earl of Carlisle, it was alike held that there was an equitable conversion in favor of the husband's heir or devisee, and, therefore, in favor of the husband himself, and yet the husband's only relation to the covenant which was assumed to have caused an equitable conversion was that of covenantor and obligor, he having no right whatever under the covenant, and no rational person will claim that a covenant can work an equitable conversion, except by virtue of a right or rights which it creates. It was also necessarily held in each of these three cases, and was expressly held in Lechmere *v.* Earl of Carlisle, that the husband's heir or devisee could maintain a suit for the specific performance of the covenant; and yet it was not possible that such heir or devisee should, as such, derive any right of action whatever from the covenant. It was also necessarily held that a relative right and the correlative obligation[3] could coexist in and devolve from the same person, — a thing plainly impossible.

The reader will also bear in mind that the true question in each of these three cases was, not whether the money in question had devolved from the husband upon his heir or devisee as if it were

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[1] Walrond *v.* Rosslyn, 11 Ch. D. 640. "To keep on foot the notional conversion of money into land, it is evident there must be a right in someone to insist upon the actual conversion." Lewin on Trusts, 10th ed., 1158 (c. xxxii).

[2] *Supra.*

[3] See *supra*, page 248, note.

land, but whether a right to have the money laid out in the purchase of land, and to have the land settled as stated in the covenant, had so devolved; and if the court had taken that view, and adhered to it consistently, it could not have made the decision that it did make in either of these cases, for it could not have failed to see that no such right could devolve from the husband, as no such right was vested in him, — that his only right consisted in the ownership of the money in question, and that that money could not possibly devolve from the husband as if it were land as a consequence of the specific performance of the covenant, since such specific performance would necessarily involve a transfer of the money from the husband to the seller of the land, and that such money could devolve from the husband as if it were land only by means of a trust created by equity itself, namely, by treating the personal representative of the husband as holding the money as a trustee for the husband's heir or devisee.

By way of showing how radical were the mistakes which the Court of Chancery was capable of making at about the time when the three cases now in question were decided, the case of Chaplin *v.* Horner[1] may be referred to, where an intended husband covenanted in a marriage settlement to lay out £2000 in the purchase of land to be settled *on himself and his heirs*, and after his death the daughter and only child of the marriage filed a bill, as her father's heir, against her mother, as his administratrix, for a specific performance of the covenant, and Sir Joseph Jekyll, M. R., made a decree in her favor; and yet the words in italics were wholly inoperative, and so the covenant was simply that the husband would lay out £2000 of his own money in the purchase of land, and, as the land, like the money, would be absolutely his, the covenant was a mere nullity.

The only other mode in which an owner of land or money can cause an equitable conversion of his land into money or of his money into land, is by the creation of a trust or duty to sell his land, or to purchase land with his money. Such a trust may be created either by deed or other act *inter vivos*, or by will, though it is nearly always done by will. Instead of creating a trust, however, a testator may, by his will, simply direct a conversion to be made, *i. e.*, he may confer a power upon his executor (I say executor, for he is nearly always the person selected) to sell his

[1] 1 P. Wms. 483.

land, or to purchase land with his money, at the same time making it his duty to exercise the power.[1] Why does the creation of such a trust or duty cause an equitable conversion? For the same reason that a contract causes an equitable conversion, namely, that equity will enforce the specific performance of such trust or duty.

When such a trust is created by deed, the equitable conversion takes place the moment that the deed is delivered; when such trust or duty is created by will, the equitable conversion takes place the moment that the testator dies, *i. e.*, the moment that the will takes effect. If, however, the trust or the duty be subject to a condition precedent, the equitable conversion will not take place until the deed or will takes effect, nor until the trust or duty becomes absolute. But the mere fact that the actual conversion is not to be made until some event which is certain to happen shall happen, for example, until such a person shall die, will not affect the time when the equitable conversion will take place. Why not? Because the time when the equitable conversion takes place depends, not upon the time when the trust or duty is to be performed, *i. e.*, when the specific performance of it may be enforced, but upon the time when the right to have it specifically performed is created. It is, as we have already seen, the creation of this right which causes an equitable conversion, and a right may exist presently, though it is not enforceable until a future day, just as a debt may exist presently, though it be not payable until a future day. If I have a right to-day to have certain land sold on the death of A, and one half of the proceeds of the sale paid to me, my right will be less valuable during A's life than it will be after his death, but its legal nature will always be the same, whether A be alive or dead.

When it is said that such a trust or duty as has been described creates an equitable conversion, no more is meant than that it will do so if certain other things concur. We have already seen that a covenant, in a marriage settlement or marriage articles, to lay out money in the purchase of land will not cause an equitable conversion, nor even create a contract, without the addition of a covenant to settle the land when purchased; and so it is of a trust to sell or purchase land. To the creation of a trust a *cestui que trust* is indispensable, and to the creation of a duty a person to

[1] See 13 HARV. L. REV. 549.

whom, or in whose favor, the duty is to be performed is indispensable. A trust or duty, therefore, to sell land must be followed up with some disposition of the proceeds of the sale, and a trust or duty to buy land must be followed up with some disposition of the land to be purchased; otherwise no trust or duty, still less any equitable conversion, will be created. What such disposition must be in order that a valid and binding trust or duty may be created, we have seen in a previous article;[1] and it may now be added that any disposition which will be sufficient to render the trust or duty valid and binding will also be sufficient to cause an equitable conversion. What will be the extent of such equitable conversion? It will be precisely coextensive with the disposition made of the proceeds of the sale, or of the land to be purchased. Thus, if a trust or duty be to sell land, and divide the proceeds of the sale between A and B, the entire fee-simple of the land will be converted in equity into money. If the trust or duty be to sell the land, and pay one half of the proceeds of the sale to A, the fee-simple of an undivided half only of the land will be converted in equity into money; and yet the entire interest in the land must be sold in order to ascertain the amount to be paid to A. While, however, the actual conversion will thus extend to the entire interest in the land, the trust or duty will extend only to this one half of the proceeds of the sale, and the remaining half of such proceeds will belong to the person or persons to whom the land belonged when the sale took place, and to whom the land would still belong if it had not been sold, and that, too, not because of any equitable conversion, or of any other principle of equity, but by virtue of common law principles alone, just as the entire proceeds of the sale would have so belonged if the creator of the trust or duty had devised the land to trustees upon special trusts, and had given to the trustees a mere authority to sell the land, and had made no disposition of the proceeds of the sale, — in which case such proceeds would belong at law to the trustees to whom the land belonged when the sale was made, and would be held by them on the same trusts on which the land was previously held.

If, on the other hand, the trust be to purchase land, and convey the same to A and B in fee, it seems that there will be no equitable conversion of the money into land, as A and B can each

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[1] 18 HARV. L. REV. 22.

claim one half of the money, just as A could claim all the money,[1] if the trust or duty had been to purchase land and convey it to him in fee, but if the trust be to purchase land, and convey the same to A for life, remainder to B in tail, remainder to C in fee, there will be a conversion in equity of the entire interest in the money into land.

In truth, the medium through which an indirect equitable conversion is made, whether it be a contract, a trust, or a duty, always constitutes the first step towards an alienation of the thing to be converted, and an acquisition, by the alienor or someone else, of the thing into which the conversion is to be made.[2] Moreover, this first step, while it does not in law or in fact complete either the alienation of the one thing or the acquisition of the other, yet it does do both in equity in a qualified sense, and it is for that reason that it is said to cause an equitable conversion. For that purpose, however, the contract, trust, or duty must be binding and irrevocable, and must also be capable of being specifically enforced in equity.

If the equitable conversion be caused by a mutually binding bilateral contract for the purchase and sale of land, the contract constitutes the first step by the seller towards the alienation of the land, and the acquisition of money instead, and the first step by the buyer towards the alienation of his money and the acquisition of land instead, and the contract is said to cause an equitable conversion both by the seller and the buyer, because equity looks upon the seller as having already parted with his land, he having incurred an obligation to part with it which equity will specifically enforce, and because equity looks upon the buyer as having, for similar reasons, already parted with his money, but chiefly because the seller has acquired by the contract a legal right to have the money paid to him on his conveying the land, and the buyer has acquired a legal right to have the land conveyed to him on his paying the money, both of which rights, being specifically enforceable, devolve in equity, the one as if it were money and the other as if it were land. If, on the other hand, the equitable conversion be caused by an unilateral covenant to purchase and

[1] Seeley *v.* Jago, 1 P. Wms. 389. In the converse case, however, of a trust to sell land, and divide the proceeds of the sale among several persons, any one of the persons interested may insist upon a sale against the wishes of all the others. Deeth *v.* Hale, 2 Mol. 317; Trower *v.* Knightley, 6 Madd. 134.

[2] See *supra*, page 248.

settle land upon the covenantor's wife and the issue of the marriage, such covenant will constitute the first step towards an alienation by the covenantor of the money to be laid out by him, and towards the acquisition, not by the covenantor, but by his wife and issue, of the land to be purchased. How are the wife and issue to acquire the land? Of course, they are to acquire it through the covenant to settle it upon them; and hence it is that the latter covenant is indispensable to the equitable conversion; and hence it is, also, that the covenant to purchase and settle land causes an equitable conversion only to the extent of the right or rights which it creates to have the land settled. To that extent, however, a covenant to purchase and settle land constitutes a complete step towards the alienation of the money by the covenantor and the acquisition of the land by the wife and issue, and hence, to that extent, it causes an equitable conversion of the money into land. The reader will observe, however, that, under a covenant to purchase and settle land, a question always arises as to the extent of the equitable conversion which the covenant causes, while, under a contract for the purchase and sale of land, no such question can ever arise, a conversion in equity of the entire interest in both the money and the land being a necessary consequence of the contract.

Finally, if the equitable conversion be caused by a trust or duty to convert land into money, or money into land, such trust or duty, each being unilateral, will constitute the first step towards the alienation by the creator of the trust or duty, of the thing to be converted, and also the first step towards the acquisition, not by the creator of the trust or duty, but by the *cestui que trust*, or the person for whom, or in whose favor, the duty is to be performed, of the thing into which the conversion is to be made, or of some interest in it. How, then, is such an acquisition to be made? Only by means of a gift from the creator of the trust or duty, and this is another reason why some gift by the creator of the trust or duty of the thing into which the conversion is to be made, is indispensable to the equitable conversion, and also why the equitable conversion can be coextensive only with such gift. To the extent of such gift, however, the trust or duty to convert land into money, or money into land, constitutes a complete step towards an alienation of the thing to be converted, and an acquisition of the thing into which the conversion is to be made; and hence, to that extent, it necessarily causes an equitable conversion of land into

money, or of money into land. In this case also, as in that of a covenant to purchase and settle land, a question always arises as to the extent of the equitable conversion caused by the trust or duty.

We have seen that an unilateral covenant to purchase and settle land can, upon principle, cause an equitable conversion only in favor of persons on whom the land is covenanted to be settled, — not in favor of the covenantor, or those claiming under him. So also, and for the same reason, an unilateral trust or duty to convert land into money, or money into land, can, upon principle, cause an equitable conversion only in favor of the *cestui que trust*, or the person for whom, or in whose favor, the duty is to be performed, — not in favor of the creator of the trust or duty, or of those claiming under him. We have also seen, however, that, in respect to a covenant to purchase and settle land, the authorities do not at all support this view, but hold that every covenant to lay out money in the purchase of land, and to settle the land, causes an equitable conversion of the money into land as much in favor of the covenantor and those claiming under him, as it does in favor of those on whom the land is covenanted to be settled and those claiming under them; and it may now be added that the authorities present the same view in respect to equitable conversions caused by a trust or duty to convert land into money, or money into land.[1]

We have also seen that according to the authorities the extent of the equitable conversion caused by a covenant to purchase and settle land is measured, not by the extent of the right or rights which the covenant creates in the land to be purchased, but by the extent of the actual conversion which the covenant makes necessary. How do the authorities answer this question in respect to an equitable conversion caused by a trust or duty to convert land into money, or money into land? Or, rather, how do they answer it in respect to such a trust or duty created by a will, for in respect to a trust created by deed they do not answer it at all.

C. C. Langdell.

CAMBRIDGE, Jan. 14, 1905.

[*To be continued.*]

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[1] Smith *v.* Claxton, 4 Madd. 484 (second devise); Jessopp *v.* Watson, 1 Myl. & K. 665; Hatfield *v.* Pryme, 2 Coll. 204; Clarke *v.* Franklin, 4 Kay & J. 257; Richerson, *In re*, [1892] 1 Ch. 379.